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In the

# Supreme Court of the United States

OCTOBER TERM, 1967

No. 682

WALLER C. BOEDEKER,

*Petitioner,*

*v.*

HAROLD C. ABRAMSON, TRUSTEE for CASCO CHEMICAL CORPORATION, BANKRUPT and UNITED STATES OF AMERICA,

*Respondent.*

## RESPONSE OF HAROLD C. ABRAMSON IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## RESPONSE OF HAROLD C. ABRAMSON IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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### STATEMENT OF THE CASE

The facts of this matter have never been in dispute. Indeed, the cause was presented to the District Court upon stipulations. Although Petitioner's detailed presentation of these agreed facts seem, in some instances, to go beyond the stipulation, the essential facts are easily stated as follows:

(a) An involuntary bankruptcy petition filed against Casco Chemical Corporation (Casco), alleging acts of bankruptcy in the words of the statute only.

(b) An amended involuntary bankruptcy petition was filed, still alleging the same acts of bankruptcy in the words of the statute, but also adding a new specific act which had occurred after the first involuntary petition was filed. (It should, properly, have been styled a supplemental pleading, and avoided all of this controversy)

(c) Casco withdrew its answer, and was adjudicated bankrupt by its consent.

(d) Between the filing of the first involuntary petition and the amended involuntary petition, Waller C. Boedeker (Petitioner), a former officer, director and shareholder of Casco, captured for his own use some two-thirds of the remaining assets of Casco.

(e) The Trustee, upon his election by the creditors, filed this suit against Boedeker, claiming the $55,000 was taken after the bankruptcy had begun.

## QUESTIONS PRESENTED FOR REVIEW

If the Bankruptcy began with the first involuntary petition, and before Boedeker seized most of Casco's assets for himself, then the Trustee can recover for the benefit of all creditors, and Boedeker will be reduced to receiving only his fair share. On the other hand, if the Bankruptcy proceeding began only with the amended involuntary petition, then Boedeker was successful in recouping his own loss ahead of the other creditors, who would then receive noth-

ing. The crucial question, then, deals with the effective date of bankruptcy, and might be posed:

> Is Bankruptcy commenced with the filing of the first involuntary petition or only with the last amendment of the involuntary petition?

Respondent cannot concur in the question as stated by the Petitioner, dealing as it does with the 'act of bankruptcy' upon which adjudication is based and the Doctrine of Relation Back. First, adjudication was not based upon any of the acts of bankruptcy alleged, but upon the consent of the bankrupt. Second, The Court of Civil Appeals below went to great lengths to point out that relation back was not an element in determining the date of bankruptcy. It expressly stated that the later pleading could not relate back to the earlier pleading, but such fact was no bar to a finding that bankruptcy began with the first petition. Petitioner's question for review is so posed that he seems to feel that the Court below is permittiing the later pleading to relate back. This respondent does not so read the opinion of the Court of Appeals.

## ARGUMENT

### I

### A Bankruptcy Preceeding Begins With The First Involuntary Petition

Perhaps the basic misconception of the Petitioner is the failure to perceive that there are actually two law suits here, as in most involuntary bankruptcy proceedings. The first law suit was against Casco Chemical Corporation; the second suit is against Waller C. Boedeker. The First was

an involuntary bankruptcy proceeding between petitioning creditors on the one hand and the alleged bankrupt on the other. The second is a civil suit brought by the Trustee in Bankruptcy against a favored creditor to set aside a voidable transfer. Neither the Trustee nor the Petitioner were parties to the first law suit, and they are concerned only with the date of its beginning and its result. With the intermediate steps they had nothing whatever to do.

The Bankruptcy Act as a whole presents a Congressional scheme for equal distribution among creditors when there is not enough to pay all in full. The basic line of demarcation is the date of bankruptcy, for this is the date when all assets of the bankrupt are deemed to come into the custody of the Court, and therefore the date of inception of the trustee's title. This is also the date when self-help and unilateral collections must cease.

It is true that, back in the first stage, the act of bankruptcy must be alleged within four months of its occurrence. This short term statute of limitations is found in Section 3b of the Bankruptcy Act, and is obviously intended to protect an alleged bankrupt from being charged with acts of bankruptcy which are remote in time. With an adjudication, its function would seem to be at an end. It is also true that numerous cases can be found in which an alleged bankrupt is relying upon Section 3b to prevent an amended pleading from setting up a new act of bankruptcy more than four months after it took place. The petitioning creditors may then contend that the new pleading relates back to the earlier pleading, and the question of relation back be-

comes quite material, requiring the Court to examine both pleadings and determine if the later is an amendment to the earlier. These cases all arise at the first stage and have to do only with the issue of adjudication itself, but have no bearing upon the question of when the bankruptcy began in a second stage suit.

Petitioner's bald statement that the opinion below is the first decision which recognizes these two stages does not bear close analysis. Without exception every one of the "conflicting" authorities cited by petitioner are first stage cases, dealing with a contest of adjudication itself. Not one is authority for permitting a creditor to use relation back after adjudication. The only new authority urged is that of *Wynne v. Rochelle*, which is not only a first stage case but also uniquely involved two separately filed, docketed and numbered involuntary petitions against the same alleged bankrupt. One was dismissed, the second resulted in adjudication. The Attempt to consolidate the two separate cases failed, but not upon any issue urged by either party to this proceeding.

There are, of course, authorities which have dealt with the precise issue, all of which agree with the opinion below. This Court long ago decided this very issue in *International Bank v. Sherman*, 101 U.S. 403 (1879). There, as here, the creditors preferred themselves between the first and the amended involuntary petitions. There as here, the creditors sought to defeat the trustee's suit against them by delaying the date of bankruptcy until the second petition upon the grounds that it did not relate back. This Court held that

the creditors are concerned only with the original commencement of the involuntary proceedings and the result, but not with any of the intermediate steps. The bankruptcy was held to have begun with the first involutary petition.

More recently, in *Commercial Credit Corporation v. Skutt*, 341 F. 2d 177 (8th Cir. 1965) the preferred creditors, when sued by the trustee, also sought to defeat the trustee by postponing the date of bankruptcy. The Court of Appeals there held that the bankruptcy began with the first involuntary petition, and that the creditors had no standing to challenge the pleadings which led to adjudication.

Again, in *Bixby v. First National Bank of Elwood*, 250 F. 2d 713 (7th Cir. 1957) the first petition (as here) alleged the acts of bankrutcy in the words of the statute. After adjudication, the preferred creditors made the same efforts to defeat the trustee. Although the Court agreed that the second petition would not have related back in the face of challenge by the bankrupt in a contest of adjudication, once there was adjudication, then the bankruptcy began with the first petition. The Court pointed out that there had only been one Bankruptcy case from commencement to conclusion, with the obvious commencement being the first petition.

The leading Treatise on Bankruptcy Law points out the same distinction in a quotation squarely on point:

> "It should be note that the rule that the new act of bankruptcy alleged in an amendment relates to the date of the amendment is limited only to the computation for the four-month period for purposes of adjudica-

> tion. After adjudication the trustee takes title to the Bankrupt's property as of the date of the original petition and may recover any property transferred by the bankrupt after the filing of the original petition, even though the adjudication was made on an act of bankruptcy alleged in an amended petition filed after the transfers occurred. 2 *Collier, Bankruptcy* 53

Although Petitioner implies that the opinion below is something new, startling and different, in fact the opinion below is in line with settled law, beginning with this Court's opinion in 1879. Petitioner is the one who wishes to seek a change in the law, apparently for the reasons set forth in page 12 of his petition where tears are wept for the bankrupt Casco. The thrust of Petitioner's position would seem to be that if the opinion below stands there will be insufficient protections from a frivilous involuntary bankruptcy petition. Again, this overlooks that the opinion below has nothing whatever to do with the protections available to an alleged bankrupt from a frivilous involuntary petition, and those protections are numerous indeed. What the opinion below will do is serve notice to insiders, favored creditors and others that once an involuntary bankruptcy petition is filed they can no longer seize the debtor's assets for themselves alone. This, as a genuine practical matter without any flights into fantasy, may give a troubled debtor a breathing spell in which to re-organize, file an arrangement or take some other suitable action.

Certainly, Petitioner is a creditor of the bankrupt, having paid out his own money upon his guarantee of the bankrupt's note at the bank, but he is no more a creditor than the many others who also paid out money, goods or services.

No amount of legal reasoning can obscure the basic fact that this particular creditor recouped much of his loss after bankruptcy was filed. Nor can it be concealed that if this creditor should prevail then a fundamental change has occurred in Bankruptcy law in which an involuntary petition is no longer a caveat to the world, the date of judicial liquidation and supervision, and the end of private seizure in favor of equality. Instead, an involuntary petition would be a meaningless gesture signalling the beginning of a race to seize all possible as the race would go to the swift rather than the just.

## II

### The Issues Of State Law Decided Are Neither Of Importance Nor Incorrectly Decided.

For the reasons stated in the opinion below, all of the decisions cited by the Petitioner were found not to be in point nor helpful, but the issues of state law were determined upon the other authorities cited in the opinion.

This Respondent would only point out, in addition, that each of these issues involved the construction of state statutes which have since been repealed. Effective July 1, 1966, the State of Texas joined 48 other states in enacting the Uniform Commercial Code. At the same time, the Assignment of Accounts Act, Article 260-1 of the Texas Civil Statutes was repealed. Recordation of assignments, and the effect of unrecorded interests under the old Texas statute have given way to security agreements and financing statements under the Code. Moreover, even the Federal Tax

Lien Statute has been amended by Congress since this case began. While construction of these obsolete statutes are of importance in this particular case, and still of historical interest, it can hardly be said that such construction is so important a present issue of state law as to compel this Court to issue its Writ of Certiorari.

## PRAYER

WHEREFORE, this respondent prays that the petition for writ of certiorari filed by Waller C. Boedeker be denied.

Respectfully submitted this the .... day of October 1967.

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*Attorney for Respondent,*
*Harold C. Abramson.*

## CERTIFICATE OF SERVICE

I hereby certify that the within Response to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit has been duly served upon counsel for all opposing parties in the case, pursuant to Rule 33 of this Court, as follows: by depositing copies of same in a United States mail box, with first class postage prepaid, addressed to Mr. Robert F. Ritchie, 1100 Republic National Bank Building, Dallas, Texas 75201, Counsel for Waller C. Boedeker, and Hon. Melvin M. Diggs, United States Attorney,

United States Courthouse, Fort Worth, Texas, counsel for the United States of America, and by air mail postage prepaid, addressed to Hon. Mitchell Rogovin, Assistant Attorney General, Department of Justice, Washington, D.C. 20530, and the Solicitor General, Department of Justice, Washington, D.C. 20530, counsel for the United States of America, this .... day of October 1967

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PHILIP I. PALMER